

No. 3666

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IN THE 2

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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Big Sespe Oil Company, a Corpora-  
tion,

*Appellant,*

*vs.*

William H. Cochran, a Citizen of the  
State of New York, and William H.  
Cochran, as Trustee for Pacific  
Crude Oil Company,

*Appellees.*

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PETITION FOR REHEARING OF APPEAL

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DUDLEY ROBINSON,  
A. I. MCCORMICK,  
*Attorneys for Appellant.*



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**PETITION FOR REHEARING OF APPEAL.**

Upon appeal from the United States District Court  
for the Southern District of California, Southern  
Division.

*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:*

The above named appellant, Big Sespe Oil Com-  
pany, a corporation, having been apprised of the de-  
cision of this Honorable Court upon the above entitled  
appeal as set forth in its opinion filed on the 3rd day

of October, 1921, petitions for a rehearing of said appeal in order that re-consideration may be given two certain points of controlling force in the decision of this case and of vital importance in the structure of the law.

We feel that the fact has escaped the attention of this Honorable Court, that the present action is brought by William H. Cochran as assignee of Pacific Crude Oil Company, and not by or on behalf of Pacific Crude Oil Company, the judgment debtor.

The decisive point in this case, therefore turns upon the construction of section 701 of the California Code of Civil Procedure which, as set forth on page 15 of the aforesaid opinion, we respectfully submit enlarges the classes of persons who may redeem from execution sale beyond the terms of the statute and the decisions of the California state courts. That section provides that property sold on execution may be redeemed by "the judgment debtor, or his successor, in interest in the whole or any part of the property."

The judgment debtor has the right of redemption, during the redemption period, at all events and without qualification. The statute so provides, as to him, and stops there. Accordingly, the California Supreme Court in the case of Yoakum v. Bower, 51 Cal. 539, 540, held that "a defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under execution."

This does not bear the construction that an assignee of the right to redeem can exercise that right, notwithstanding the judgment debtor has conveyed to yet another person the property sold under execution. Neither does that court's decision bear the construction that the assignee of the right to redeem might redeem notwithstanding he was not the successor in interest of the judgment debtor in the whole or any part of the property.

The clear limit of that decision was that the right to redeem, independent of interest in the property, was vested by the statute peculiarly in the judgment debtor, *as such*. It said:

“The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor, as such, may redeem; not that he may redeem only, and in the event, that he has no successor in interest in the property sold under execution.”

So far as we have been able to find, no California decision has held that a judgment debtor, possessing no title, could assign the bare right of redemption, and invest an assignee, devoid of any “interest in the whole or any part of the property,” with the right to redeem. It has not been held that he could effectively transfer the right to redeem and retain title to the property. It has not been held that any person, other than the judgment debtor having an interest in the property, might redeem, unless he be the judgment

debtor's successor in interest in the whole or any part of the property.

In the case of Southern California Lumber Company v. McDowell, 105 Cal. 99, cited in the opinion of this Honorable Court, the assignee of the judgment debtor was the successor in interest of the judgment debtor in a part of the property. Thus he came within the language of the statute. We respectfully submit that the limit of that holding was that the successor in interest need not have vested in him the whole of the property. It could not be said that the court would have held the assignee to be entitled to redeem if he had possessed no interest in the property. The court clearly recognized the fact that some interest was necessary in order to vest this purely statutory right because in conclusion it used this language:

“Therefore, conceding, as we must, that the hotel company had a sufficient interest in the property to entitle it to redeem the whole block, notwithstanding its conveyance of the nineteen lots to the San Diego, Eastern & Terminal Railway Co., it must follow that it (the judgment debtor) could convey or assign such interest to Swayne, ‘for the purpose of having the certificate of redemption of said property from said sale issued in his name,’ as expressed in the deed to Swayne, and thereby authorize and entitle Swayne to make the redemption in his own name as he did.”

The interpretations of the two phases or aspects of this statute, found in the above quoted cases, to-wit, first, that the judgment debtor, as such may redeem, notwithstanding he has conveyed to another the property sold under execution, and, second, that the judgment debtor's successor in interest to a part (but not all) of the property, may redeem, do not support the proposition that a person who is neither the judgment debtor nor the successor in interest, in the whole or any part of the property, may redeem. They do not support the proposition that the bare right of redemption, residing peculiarly in the judgment debtor, "*as such*," is enforceable by or through as assignee.

Later in the opinion this Honorable Court states, as the trial court held, that, "when the execution sale was had, Cochran was the holder and owner of the legal title to the property in actual possession and operating the same. The Pacific Crude Oil Company had then no right of possession." If the redemption is adjudged in this action in favor of William H. Cochran as assignee of Pacific Crude Oil Company, we respectfully submit that the decision of this case will have the effect of enlarging the scope of said section 701 to permit redemption to be made by the judgment debtor, and also his assignee of the right of redemption, as well as his successor in interest in the whole or any part of the property. Under such construction the judgment debtor undoubtedly would be permitted to convey his interest in the property to one person and assign his right of redemption to



another person. We respectfully submit that in order to qualify the complainant in this case to redeem the property the statute would have to be construed to read that redemption might be made by the judgment debtor, or his successor in interest in the whole or any part of the property, or his assignee of the right of redemption though not succeeding him in any interest in the whole or any part of the property. As we view it, this must create a class not mentioned in the statute, and be destructive of the purpose and intent of the statute to require certain particular qualifications, therein provided, as prerequisites to redemption by any persons except the judgment debtor.

Not being entitled to redeem, William H. Cochran in his capacity as assignee should be denied the accounting prayed for in the bill of complaint. Speaking of a provision in subdivision 2 of the above mentioned section 701 of the Code of Civil Procedure, the California Supreme Court in *Bangham v. Michael*, 179 Cal. 390, 392, denying to a bank the privileges of a redemptioner said:

“The right of the holder of a junior lien to redeem property sold under a decree of foreclosure of a prior mortgage thereon is purely statutory and in the absence of a compliance therewith, a tender of the money required to redeem is wholly ineffectual for the purpose.”

In the case of *Eldridge v. Wright*, 55 Cal. 531, 533, the court said, “the right to redeem exists only by virtue of the statute, and under its provisions we must



find the measure of right.” We respectfully submit that the courts of the state of California have uniformly construed this statute strictly within the terms of its language, never following exceptions or special cases until the diverging lines of interpretation permitted the creation of an additional class of persons entitled to redeem. The danger of producing such a result by the decision of the present case is, we believe, and respectfully submit, of a gravity which would justify a re-consideration of this appeal.

The second point affects the theory upon which the amount of recovery is ascertained. As above stated this Honorable Court has in its opinion stated that the Pacific Crude Oil Company had no right of possession. Yet the rule of trespass is invoked in favor of the Pacific Crude Oil Company. At page 17 of the opinion of this Honorable Court it is said:

“In the present case the judgment debtor, not in possession, may have had a right to obtain possession under certain conditions and in a lawful manner, but under no circumstances did the Pacific Crude Oil Company have more than a qualified estate which it had not reduced to possession. The District Court so held and advanced to the logical conclusion that inasmuch as the Big Sespe Oil Company had no right to possession its possession became a trespass.”

*The affirmance of the decree in this cause would result in depriving this appellant of two hundred forty-five (245) acres of valuable oil producing lands originally owned by it, which was not paid for in full, and*

*of depriving it of the benefit, and penalizing it to the extent of the major portion of its judgment for part of such purchase price, in addition to requiring appellant to pay to the alleged assignee of the delinquent debtor the sum of approximately four thousand (\$4,000.00) dollars.*

We respectfully suggest that as between the Pacific Crude Oil Company and the Big Sespe Oil Company it would have been impossible for the latter to commit trespass against the former. Trespass is a violation of the right of possession. It occurs to us and we respectfully suggest that if this Honorable Court, scrutinizing the basis of right of the Pacific Crude Oil Company to claim trespass, should find it impossible to declare that right to exist without declaring this to be an exception to the rule of possession, not heretofore declared, a reconsideration of the case might be required upon this point alone. Whether Mr. Cochran in his capacity as trustee could sustain a claim for trespass would depend, if the question were litigated, upon the facts as to estoppel by his knowledge and conduct. The very argument upon which this Honorable Court finds that Cochran was recognized by the Big Sespe Oil Company as the representative of the Pacific Crude Oil Company for several years prior to the execution sale and during the year thereafter, would support the contention that he knew of and did not protest against the occupation and operation by the Big Sespe Oil Company if indeed he did not actually acquiesce therein. That aspect of

the case was not tried, not being in issue, except as it was latterly presented under the complaint in intervention, which was presented and acted upon within a few hours immediately preceding the signing of the final decree and without trial. The theory of holding the defendant under the severe rule of trespass was first discussed before the Special Master. As stated in the opinion of this Honorable Court on page 9:

“Cochran’s evidence is that after the sale of the property on March 3, 1917, he conferred with the secretary and treasurer of the appellant as to what could be done with the situation into which affairs had drifted; that toward the fall of 1917, he told the secretary and treasurer that he wished a statement of what moneys appellant had received from the property and what expenses had been incurred so that he would know what moneys were necessary to redeem the property.”

The Special Master was disturbed by consideration of the present question is indicated by the concluding remarks of his memorandum of opinion as it appears on page 418 of the transcript of record where, among other things, he says:

“If, as asserted by the complainant, the defendant acquired no rights in or to these oil lands, by virtue of the execution sale, because the title was vested in Mr. Cochran as trustee, whom the judgment did not affect, and if Cochran as trustee is the legal owner of the lands, and of the oil extracted therefrom, then why should the defendant account in this action to Cochran individually?”

Neither Cochran nor the Pacific Crude Oil Company could have extracted the oil from the land without heavy expense. The harsh rule mulcting the defendant not only of the actual profits from the use of the property but also of all the moneys expended in the operation thereof certainly must be limited to invocation by or in favor of a person entitled to the possession of the property.

For the foregoing reasons the appellant respectfully requests a rehearing of this cause upon appeal and a reconsideration of the decision of this Honorable Court to the end that the disposition of this case may be in accordance with the principles above set forth.

Respectfully submitted,

Dated October 31, 1921.

DUDLEY ROBINSON,

A. I. McCORMICK,

*Attorneys for Appellant.*

The undersigned, Dudley Robinson, one of the counsel for the appellant in this cause, hereby certifies that the foregoing petition for rehearing is, in his judgment, well founded in law and that it is not interposed for delay.

DUDLEY ROBINSON,

*Counsel for Appellant.*